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No. 00-497

In The

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

DELORES CLAY, as Administratrix of the Estate of KATHLEEN P. CLAY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME AND BRIEF OF *AMICUS CURIAE*, PRODUCT LIABILITY ADVISORY COUNCIL, INC., IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a trial court, when ruling on a motion to exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and Federal Rule of Evidence 702, must make certain that the record reflects: (1) the factors that it found to be reasonable measures of the reliability of the expert testimony; (2) the grounds on which it selected those factors; and (3) how it applied those factors to determine the reliability and relevance of the expert's testimony.

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF OUT OF TIME

Amicus Curiae, Product Liability Advisory Council, Inc. (PLAC) respectfully moves this Court for leave to file, out of time, its Brief of *Amicus Curiae* in support of the Petition for Writ of Certiorari filed by Petitioner, Ford Motor Company. Respondents have withheld consent for the filing of this *amicus curiae* brief. As required under Supreme Court Rule 37.2(b), PLAC's Brief of *Amicus Curiae* is filed as one document with this Motion. PLAC considers the legal issues raised in the Petition for a Writ of Certiorari to be of particular importance to its members and, more broadly, to all litigants who confront issues regarding the reliability and relevancy of expert testimony in the federal courts. PLAC has submitted *amicus curiae* briefs on the merits in each of this Court's major cases addressing the standards for determining the reliability of expert opinion testimony, including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). PLAC has submitted *amicus curiae* briefs in support of petitions for writ of certiorari in important cases, including *Subaru of Am., Inc. v. Compton*, 519 U.S. 1042 (1996), *denying cert. to*, 82 F.3d 1513 (10th Cir. 1996). PLAC has also submitted *amicus curiae* briefs in numerous other federal appellate courts and state courts of last resort concerning the appropriate standards and procedures that trial courts should employ in fulfilling their gatekeeper obligations.

Because PLAC's Brief provides information and arguments that bring to the attention of the Court relevant matter not already brought to its attention by the parties,

its participation as *amicus curiae* may be of considerable help to the Court. *See* Sup. Ct. R. 37.1.

Operating on information that turned out to be erroneous, PLAC believed that its Brief of *Amicus Curiae* could be filed as late as November 22, 2000, when in fact it was due on November 1. Upon learning of its misunderstanding on November 7, PLAC completed its brief and submits it herewith for the Court's consideration. No party will be prejudiced by permitting PLAC to file this Brief, and the acceptance of this Brief should not delay this Court in reaching its decision on the Petition.

WHEREFORE PLAC respectfully requests that the Court grant its Motion for Leave to File its Brief of *Amicus Curiae* Out of Time.

Respectfully Submitted,

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 132 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 525 briefs as *amicus curiae* in both state and federal courts, including this Court, to present the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. A list of PLAC's corporate members is attached as an Appendix.[1]

SUMMARY OF ARGUMENT

When ruling on a challenge to the reliability of expert testimony, a trial court must make certain that the record clearly reflects the grounds supporting its decision to

[1] Pursuant to Supreme Court Rule 37.6, PLAC states that no counsel for a party has authored this brief in whole or in part and that no person or entity other than PLAC has made a monetary contribution to the preparation or submission of this brief.

admit or exclude the expert evidence. Otherwise, the appellate court has no way to review whether the trial court abused its discretion in admitting or excluding the evidence, and it cannot discern whether the factors considered by the trial court were "reasonable measures of reliability" in the particular case, as required by *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999). Without an adequate record, the appellate court would be forced to undertake what amounts to *de novo* review contrary to this Court's holding in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

Importantly, the circuit courts of appeals have taken irreconcilable approaches to this issue. Some have correctly required that the trial court's record clearly reflect the grounds for the trial court's ruling, reversing and remanding the case when the record is devoid of information on which the appellate court can determine whether the trial court abused its discretion. Others, like the court below, have affirmed the trial court's ruling without being able to determine whether, in fact, the trial court applied factors that were reasonable measures of reliability in assessing the admissibility of expert testimony.

Indeed, the affirmance of a trial court's *Daubert*[2] ruling when the record fails to reveal the basis for it runs directly afoul of this Court's teachings in *Daubert*, *Joiner*, and *Kumho*. Without a record, trial courts may evade the error-correcting function of the circuit courts, escaping any determination whether the trial court's ultimate decision to admit or exclude the expert testimony was based on factors that are reasonable measures of reliability.

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[2] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Furthermore, the absence of a record reflecting the court's reasoning undermines public confidence in the judiciary in this important arena where judges fulfilling their gatekeeping roles have been challenged as playing amateur scientists. Because of the importance of this issue, which arises in a growing number of civil and criminal cases, Ford Motor Company's Petition for a Writ of Certiorari should be granted.

ARGUMENT

THIS CASE PRESENTS THE SIGNIFICANT QUESTION WHETHER THE RECORD MUST REFLECT THE GROUNDS UPON WHICH THE TRIAL COURT ADMITTED OR EXCLUDED EXPERT EVIDENCE WHICH WAS CHALLENGED AS UNRELIABLE.

This Court should grant Ford Motor Company's Petition for a Writ of Certiorari in order to determine whether the Sixth Circuit Court of Appeals erred in affirming the trial court's judgment because the trial court record does not reveal the grounds for the denial of Ford's motion to exclude the plaintiffs' expert's testimony. This is a frequent and recurring question in federal cases, particularly in product liability cases and other tort actions. A 1998 study conducted by the Federal Judicial Center shows that 45% of federal civil trials involving expert witnesses were tort actions. *See* Molly Treadway Johnson, *et al.*, Federal Jud. Ctr., EXPERT TESTIMONY IN CIVIL TRIALS: A PRELIMINARY ANALYSIS 1 (2000). Since *Daubert* was announced, challenges to expert testimony have increased dramatically, both in civil and criminal cases. Federal judges have observed a disturbing trend in expert witness testimony: high-dollar experts act as advocates

for their clients and abandon both their objectivity and their concern for providing reliable grounds for their opinions. *See id.* at 5-6. Not surprisingly, as *Daubert* issues increase in the trial courts, they also have produced many recurring, and frequently avoidable, appellate issues.

Appellate courts are struggling with how to review trial courts' decisions on *Daubert* motions, and the circuits have come to varying conclusions on several important issues. On some issues, the circuits' differing approaches can coexist, but on others – such as those addressed in this case – they cannot. The need for the trial court to make certain that the record is clear about the basis of its *Daubert* decision is critical to provide guidance to litigants and their experts and to facilitate effective appellate review. Without clear trial court findings, the circuit courts must scour the cold record in an effort to divine the trial courts' decision making process. This tempts the appellate court to perform a *de novo* review, in the guise of reviewing for an abuse of discretion. Such a result runs counter to the Court's holding in *Joiner* and *Kumho*, which commit the decision whether to admit or exclude expert testimony to the trial court's sound discretion. *See Kumho*, 526 U.S. at 152; *Joiner*, 522 U.S. at 142-47.

The importance of appropriate error-correcting appellate review over *Daubert* decisions cannot be overstated. Three times since 1997 this Court has decided cases involving the manner in which appellate courts review trial courts' *Daubert* decisions:

- In *Joiner*, the Court determined that the appropriate standard of review for the trial court's ultimate decision to admit or exclude expert testimony was abuse of discretion;

- In *Kumho*, the Court held in part that the trial court also has discretion to select the reliability factors by which it evaluates the expert testimony in a particular case so long as those factors are "reasonable measures" of the reliability of the evidence offered; and,

- Most recently in *Weisgram v. Marley Co.*, 120 S.Ct. 1011 (2000), the Court held that, when an appellate court concludes that a trial court erroneously failed to exclude inadmissible expert testimony under *Daubert*, the appellate court may direct entry of judgment as a matter of law in favor of the verdict loser if it finds that the verdict could not be sustained in the absence of the verdict winner's inadmissible evidence.

In each of these three cases, the Court unanimously resolved inter-circuit splits relating to the appropriate conduct for appellate courts addressing appeals of trial courts' *Daubert* decision. This case, too, represents an opportunity for the Court to provide much-needed guidance to trial and appellate courts alike on a recurring problem – the absence of a sufficiently detailed trial court record to facilitate proper appellate review of the trial court's performance of its gatekeeping function.

When the admission or exclusion of expert testimony under Rule 702, *Daubert*, *Joiner*, and *Kumho* is involved, PLAC submits that a trial court must make certain that the grounds for its decision are adequately preserved for the record.[3] More specifically, the trial court record must

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[3] Significantly, in all three cases in the Court's "*Daubert* Trilogy," the trial court decisions under review were fully

clearly reveal: (1) the factors that the trial court finds to be reasonable measures of the reliability of the expert testimony in question; (2) the basis for the trial court's selection of the applicable factors; and (3) how the trial court applied these factors to reach its conclusion about the reliability and relevance of the testimony in question.[4]

None of this ties the trial court's hands in deciding how to make its record. Trial courts must have some level of discretion in the manner in which they explicate their findings. *See, e.g., Ancho v. Pentek Corp.*, 157 F.3d 512, 518

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explained in detailed and well-written orders: **(1)** *Daubert v. Merrell Dow Pharms., Inc.*, 727 F. Supp. 570 (S.D. Cal. 1989), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *rev'd*, 509 U.S. 579 (1993), *on remand*, 43 F.3d 1311 (9th Cir. 1995), *cert. denied*, 516 U.S. 869 (1995); **(2)** *Joiner v. General Elec. Co.*, 864 F. Supp. 1310 (N.D. Ga. 1994), *rev'd*, 78 F.3d 524 (11th Cir. 1996), *rev'd*, 522 U.S. 136, 146 (1997); **(3)** *Carmichael v. Samyang Tires, Inc.*, 923 F. Supp. 1514 (S.D. Ala. 1996), *rev'd*, 131 F.3d 1433 (11th Cir. 1997), *rev'd*, 526 U.S. 137 (1999).

[4] PLAC is not advocating that an evidentiary hearing is required in every instance in which a motion to exclude expert testimony is made. And PLAC views the issues being addressed in this case as analytically distinct from the question whether a trial court is required to hold a "*Daubert* hearing" in a particular case. Indeed, this Court recently denied a petition for writ of certiorari addressing the question whether a trial court was required to hold a hearing before excluding expert testimony under *Daubert*. *See Kirstein v. Parks Corp.*, 159 F.3d 1065 (7th Cir. 1998), *cert. denied*, 526 U.S. 1065 (1999). In *Kirstein*, unlike this case, it was clear that the trial court had made specific written findings in deciding the *Daubert* issue. *See Kirstein v. W.M. Barr & Co.*, 983 F. Supp. 753 (N.D. Ill. 1997) (providing detailed explanation for the exclusion of the proffered expert testimony), *aff'd*, 159 F.3d 1065 (7th Cir. 1998), *cert. denied*, 526 U.S. 1065 (1999).

(7th Cir. 1998) ("Trial judges need only follow (*i.e.*, adhere to) *Daubert* when making a FED. R. EVID. 702 determination . . . ; they are not required to recite the *Daubert* standard as though it were some magical incantation."); *cf.* FED. R. EVID. 103(b). On-the-record findings are necessary not as a formalistic expression of *Daubert* as a "holy writ," *see Kumho*, 526 U.S. at 159 (Scalia, J., concurring), but as a means of allowing an appellate court to determine whether the trial court operated within reasonable bounds in admitting or excluding the testimony in question. *See id.* ("in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.").

I. UNDER *DAUBERT* AND ITS PROGENY, THE TRIAL COURT'S DISCRETION IS LIMITED TO THE EXERCISE OF SOUND DISCRETION; DECISIONS ON *DAUBERT* MOTIONS BASED ON UNARTICULATED REASONING ARE ARBITRARY DECISIONS WHICH ABUSE THE DISCRETION OF THE COURT.

Daubert, *Joiner*, and *Kumho* have each recognized the discretionary nature of the trial court's inquiry into the reliability of proffered expert testimony. To say that the trial court has discretion simply means that there is no hard-and-fast rule. *The Styria v. Morgan*, 186 U.S. 1, 9 (1902). But trial courts must exercise *sound* discretion in accordance with what is right and equitable under the circumstances, and not act in a merely arbitrary manner. *Langnes v. Green*, 282 U.S. 531, 541 (1931). A trial court "may abuse its discretion by failing to exercise its discretion, by applying inappropriate analytical criteria, or by

exceeding the range of permissible choices." *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners at 20, *in Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (No. 97-1709) (*citing Koon v. United States*, 518 U.S. 81, 98-100 (1996); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-405 (1990)). Thus, a trial court's failure to articulate the reason for its decision on an evidentiary point may constitute an abuse of discretion, particularly when the appellate court is unable to determine the means by which the trial court arrived at its conclusion.

In varying contexts, this Court has noted the value of having an explanation provided as a means of legitimizing the decision-making process. In his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951), Justice Frankfurter warned about dangers that lurk when public officials make decisions without any explication of their reasoning. He counseled, "[t]hat a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conclusion largely depends on the mode by which it was reached." *Id.* (Frankfurter, J., concurring) (*cited in United States v. Long*, 574 F.2d 761, 770 n.9 (3d Cir. 1978) (Adams, J., concurring) (noting that the trial court should be required to balance probative value and prejudicial effect on the record and that "[s]uch reasoned adjudication is the cornerstone of the legitimacy of the actions of the judiciary, and an essential safeguard of the proper exercise of the trial court's broad discretion.")). At another point in his concurrence, Justice Frankfurter noted that one of three fundamental "principles of natural justice" is that " 'a party is entitled to know the reason for the decision.' " *Joint Anti-Fascist Refugee Comm.*, 341

U.S. at 170 n.17 (*quoting* United Kingdom's Report of Committee on Ministers' Powers, Cmd. 4060 at 75-80 (1936)).

Expressing a similar idea in a different context, in *United States v. Merz*, 376 U.S. 192, 198 (1964), the Court commented on the need for on-the-record findings in the context of the trial court's appointment of commissioners to resolve issues of just compensation in eminent domain proceedings. The Court observed that "[c]onclusory findings are alone not sufficient, for the commission's findings shall be accepted by the court 'unless clearly erroneous'; and conclusory findings as made in these cases are normally not reviewable by that standard, even when the District Court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence." *Id.*

A. A Trial Court's Failure to Articulate The Grounds For Its *Daubert* Decision May Undermine Confidence in The Federal Courts.

The trial court's proper exercise of its discretion and an explanation of its reasoning are particularly important in preserving public confidence in our federal courts. As reported in a recent publication of the Carnegie Commission on Science, Technology, and Government:

> The courts' ability to handle complex science-rich cases has recently been called into question, with widespread allegations that the judicial system is increasingly unable to manage and adjudicate science and technology (S&T) issues. . . . If these claims go unanswered, or are not dealt with, confidence in the judiciary will be

> undermined as the public becomes convinced that the courts as now constituted are incapable of correctly resolving some of the most pressing legal issues of our day.

Carnegie Commission on Science, Technology, and Government, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES 11 (1993). These concerns were recently echoed in the House Science Committee's hearings regarding the establishment of a national science policy. *See Role of Science in Policy Decisions, 1998: Hearings Before the House Comm. on Science*, 105th Cong. (1998) (statement of Mark S. Frankel, Ph.D., Director, Program on Scientific Freedom, Responsibility and the Law Directorate for Science and Social Programs, American Association for the Advancement of Science). When trial courts fail properly to explicate the grounds for their decision to admit or exclude expert testimony, they may be vulnerable to allegations of arbitrary decision-making or one-sidedness. *See, e.g.*, Sheila Jasanoff, *What Judges Should Know About the Sociology of Science*, 77 JUDICATURE 77, 82 (1993) (trial courts evaluating scientific testimony "inescapably give up the role of dispassionate observer to become participants in a particular construction . . . of scientific facts."); *see also* Susan J. Becker, *Child Sexual Abuse Allegations Against Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges*, 74 DENV. U. L. REV. 75, 91 (1996) ("The judge may be particularly tempted to abandon careful review of scientific principles in favor of crediting the expert's conclusions which coincide with the judge's personal beliefs."). If the record reflects the basis for the court's ruling, these criticisms

may be avoided, and the public confidence in the court may be elevated.

B. A Trial Court's Failure to Articulate the Grounds for Its *Daubert* Decision Prejudices the Litigants and Undermines the Truth-Seeking Process.

Even leaving aside the broader social ramifications, when a trial judge fails to make a sufficient record on his or her ruling on a *Daubert* issue, the litigants bear the immediate, and possibly irreparable, consequences. In trial court's application of *Daubert*, the wholesale exclusion of expert testimony is the exception rather than the rule. *See* FED. R. EVID. 702 advisory committee's note (as amended). Still, sometimes *Daubert* issues are dispositive. When critical evidence is excluded, summary judgment often is not far off. *See Daubert*, 509 U.S. at 596. And when unreliable evidence is admitted, a case ripe for judgment as a matter of law might erroneously be allowed to go to the jury, often at great cost to the party who sought unsuccessfully to exclude the evidence. *See, e.g., Weisgram*, 120 S.Ct. at 1021-22. And there are some cases where some expert testimony is excluded but the case proceeds to trial anyway. *See* Molly Treadway Johnson, *et al., supra*, at 4.

In all of these cases, litigants, their experts, and the appellate courts benefit from a clear articulation of the reasons for the trial court's decision to admit or exclude the expert testimony in question. When a trial court has decided to exclude some, but not all, of an expert's proffered testimony, or where a trial court has indicated that

the reliability issue may be revisited during trial, it is critically important that litigants and their expert witnesses understand the scope and boundaries of the trial court's decision. *See* William W. Schwarzer & Joe S. Cecil, *Management of Expert Evidence, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 39, 54 (2d ed. 2000). Conversely, when a trial court's decision regarding expert testimony is dispositive of a case – as it was in *Daubert, Joiner,* and *Kumho* – it is essential that the trial court explain the basis for its discretionary decision so as to facilitate appellate review.

C. Commentators And Lower Courts Have Recognized The Need For a Clear Record on These Important Evidentiary Decisions.

Commentators and some lower courts agree on the need for a good trial court record, particularly in light of *Kumho's* admonition that the trial court must select criteria that are reasonable measures of reliability when ruling on a *Daubert* motion. The new edition of the Federal Judicial Center's REFERENCE MANUAL OF SCIENTIFIC EVIDENCE advises that "[r]ulings on *in limine* motions [to exclude expert testimony] should be by written order or on the record, stating specifically the effect of the ruling and the grounds for it. The court should clearly indicate whether the ruling is final or might be revisited at trial." William W. Schwarzer & Joe S. Cecil, *Management of Expert Evidence, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 39, 54 (2d ed. 2000). Likewise, the most recent supplement to the late Professor Wright's treatise on federal practice states that, in light of *Kumho,* "[a] trial court should put

on the record both its conclusion concerning the application of *Daubert* and the reasoning behind that conclusion." 29 Charles Alan Wright & Victor James Gold, FEDERAL PRACTICE AND PROCEDURE § 6266 at 23 (Supp. 2000). As Professor Wright observed, "[u]nless the trial court puts on the record the factors it believes pertinent to its reliability determination in a given case, a reviewing court will have difficulty determining what those factors were." *See* Charles Alan Wright, *supra*, § 6266 at 28 n.90.2. And some circuit courts have mandated express findings and conclusions in rulings on motions to exclude experts under *Daubert* and *Kumho*. *See, e.g., Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1088 (10th Cir. 2000).

These authorities are in accord with a long line of circuit court authority addressing the need for on-the-record findings when a trial court is balancing probative value and the danger of unfair prejudice under Federal Rule of Evidence 403. In Rule 403 cases, several circuits have held that the trial court's record must reflect the trial court's reasoning as it engages in the balancing test required by that rule. *See Hernandez v. Cepeda*, 860 F.2d 260, 265 (7th Cir. 1988) ("Although a district court's decision to admit or exclude evidence is reviewable only for an abuse of discretion, we cannot make that determination where the court's exercise of its discretion is not apparent from the record. In some circumstances, the failure to exercise discretion may itself be an abuse of discretion."); *United States v. Robinson*, 700 F.2d 205, 213-14 (5th Cir. 1983) ("In the absence of on-the-record findings . . . we will be obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and

there is no substantial uncertainty about the correctness of the ruling."); *United States v. Lebovitz*, 669 F.2d 894, 902 (3d Cir. 1982) (Adams, J., concurring) ("the realities of trial preclude a detailed exegesis by the trial judge of the decision to admit or exclude relevant, prejudicial evidence. But the *exercise* of a judge's discretion requires just that – exercise, application, overt action."), *cert. denied*, 456 U.S. 929 (1982); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) ("articulation of the reasons for the decision tends to provide a firm base for an appellate judgment that discretion was soundly exercised. It confines review of the exercise of discretion to its appropriate scope – *i.e.*, whether the relevant factors were considered and given appropriate weight – and discourages reversal on the ground that appellate judges might have decided differently had they been the original decisionmakers."); *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976) (reversing conviction because trial court excluded critical defense expert without explanation of its reasoning, and noting that "where the reasons for a discretionary ruling are not apparent to counsel, they will probably not be apparent to an appellate court.").

D. The Sixth Circuit's Decision Here Reveals a Misapprehension of *Daubert's* Basic Commands and Undermines, Rather than Affirms, the Trial Court's Discretion.

The Sixth Circuit Court of Appeals' decision in this case is contrary to the decisions in other circuits and the learned commentary on the rules of evidence. *Cf. Clay v. Ford Motor Co.*, 215 F.3d 663, 666 (6th Cir. 2000). Because the trial court here left no clues behind as to why it

decided to admit Richardson's testimony, the Sixth Circuit was left to speculate about what the trial court might have been thinking. Indeed, the Circuit's tentative references to the record demonstrate its uncertainty, particularly when it found that the trial court "in its discretion, *could* have decided that Richardson's failure to test his theories went to the weight of this testimony. . . . " *Clay*, 215 F.3d at 668 (emphasis added). This type of conjectural, after-the-fact analysis smacks of *de novo* review – while according discretion to the trial court's ultimate decision, the Court of Appeals injected its own analysis and balancing of the *Daubert* factors into the equation in order to achieve an outcome that supported the trial court's ultimate (though unannounced) finding of admissibility. And that, PLAC submits, is completely contrary to the letter and spirit of *Kumho*.

The Court should take this opportunity to clarify the trial court's duties to make a record concerning the manner in which it fulfilled its gatekeeping function, an issue which has become critical in many cases following the announcement of this Court's decision in *Kumho*. The continuing development of the law of expert testimony and the impact that admission or exclusion of such evidence has on the outcome of cases makes it imperative that this issue be resolved, and that trial courts be provided with clear guidance on this issue.

II. THE RECENT AMENDMENT TO RULE 702 AMPLIFIES THE NEED FOR TRIAL COURTS TO MAKE A COMPLETE RECORD OF THE FACTORS THEY CONSIDER IN RULING ON *DAUBERT* ISSUES.

The amended version of Federal Rule of Evidence 702 will become effective on December 1, 2000, absent

Congressional action to the contrary.[5] This amendment is intended to (1) respond to *Daubert, Joiner,* and *Kumho;* (2) affirm the trial court's role as gatekeeper; and (3) provide some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. FED. R. EVID. 702 advisory committee's note (as amended). The Advisory Committee's note to the amended Rule 702 also suggests five specific factors in addition to the four "*Daubert* factors" that may be reasonable measures for assessing the reliability and relevance of expert testimony. These factors include:

- Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.
- Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.

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[5] As amended, Rule 702 will provide that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

- Whether the expert has adequately accounted for obvious alternative explanations.

- Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.

- Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

FED. R. EVID. 702 advisory committee's note (as amended) (citations omitted).

We know from *Daubert* and *Kumho* that the four *Daubert* factors are not a checklist and that trial courts have broad discretion to select other relevant admissibility criteria so long as they are reasonable measures of reliability. The amended version of Rule 702 complicates the *Daubert* equation. Without a clear record showing the trial court's reasoning, the appellate court must guess about which factors, out of a limitless field of criteria, the trial court actually relied on in making its *Daubert* decision. If the record is void and prevents the appellate court from performing its function, then remand is the typical remedy. But when a case has gone through a long trial and a verdict has been reached, there is a temptation to excuse the gatekeeper's lapse and let the judgment, right or wrong, stand. This temptation will only increase when appellate courts consider the wider range of factors suggested by the Advisory Committee's note to the amended Rule 702.

CONCLUSION

Ford Motor Company raises important issues in its Petition for a Writ of Certiorari. These are issues that have divided the circuit courts which reflect very different understandings of the trial court's role as gatekeeper after *Kumho*. With the amendments to Rule 702, these issues will only grow in importance and in the frequency with which they are encountered by trial and appellate courts. This Court should take the opportunity now to address the procedures to be used by trial courts in deciding whether to admit or exclude expert testimony under Rule 702, *Daubert*, and *Kumho*.

For these reasons, PLAC respectfully requests that this Court grant Ford Motor Company's Petition for a Writ of Certiorari.

Respectfully Submitted,

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APPENDIX

CORPORATE MEMBERS OF PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M
Allegiance Healthcare Corporation
Altec Industries
American Home Products Corporation
American Medical Systems, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Andrx Corporation
Anheuser-Busch Companies, Inc.
Appleton Papers, Inc.
Aventis Pharmaceuticals
BASF Corporation
Baxter International, Inc.
Bayer Corporation
BIC Corporation
Biomet, Inc.
Biro Manufacturing Company Inc.
Black & Decker (U.S.) Inc.
BMW of North America, Inc.
Boeing Company, The
Bombardier Recreational Products
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Brown and Williamson Tobacco
Brown-Forman Corporation
Budd Company, The
C.R. Bard, Inc.
Caterpillar, Inc.
Chevron Corporation
Clark Material Handling Company
Coleman Company, Inc., The
Compaq
Continental General Tire, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Daimler Chrysler Corporation
Dana Corporation
Deere & Company
Dow Chemical Company, The
E. & J. Gallo Winery
E. I. DuPont de Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Estee Lauder Companies
Euclid Hitachi Heavy Equipment, Inc.
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
Freightliner Corporation
Gates Corporation, The; Stant Corporation

General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
Glaxo Wellcome Inc.
Global Industrial Technologies, Inc.
Goodyear Tire & Rubber Company, The
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation, Gas & Fluid Control Group
Heil Company, The
Henkel Corporation
Honda North America, Inc.
Hyundai Motor America
International Paper
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joseph E. Seagram & Sons, Inc.
Kawasaki Motors Corp., U.S.A.
Kolcraft Enterprises, Inc.
Kraft Foods
Lucent Technologies
Mack Trucks, Inc.
Makita U.S.A., Inc.
Mazda (North America), Inc.
Medtronic Sofamor Danek, Inc.
Medtronic, Inc.
Melroe Company
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors R. & D. of America, Inc.
Monsanto Company/G.D. Searle & Co.
Motor Coach Industries International, Inc.
Niro Inc.
Nissan North America, Inc.
O.F. Mossberg & Sons, Inc.
Otis Elevator Company
PACCAR Inc.
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Philip Morris Companies, Inc.
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Procter & Gamble Company, The
Raymond Corporation, The
Raytheon Aircraft Company
Rheem Manufacturing
RHI Refractories America
RJ Reynolds Tobacco Company
Rover Group, Ltd.

Schindler Elevator Corporation
SCM Group USA, Inc.
Sears, Roebuck and Co.
Shell Oil Company
Sherwin-Williams Company, The
Siemens Corporation
Smith & Nephew, Inc.
Snap-on Incorporated
Solutia Inc.
Sturm, Ruger & Company, Inc.
Subaru of America
Synthes (U.S.A.)
Textron Inc.
Thomas Built Buses, Inc.
Toro Company, The
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Wilbur-Ellis Company
Wilson Trailer Company
Yamaha Motor Corporation, U.S.A.